

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RODRICK MATHENY,

Plaintiff,

v.

UNUMPROVIDENT
CORPORATION; UNUM LIFE
INSURANCE COMPANY OF
AMERICA; DIRECT RESPONSE
INSURANCE ADMINISTRATIVE
SERVICES, INC., d/b/a
INSURANCE ADMINISTRATIVE
SERVICES; U.S. BANK, NA, d/b/a
U.S. BANK HOME MORTGAGE;

Defendants.

NO. CV-06-365-RHW

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

On December 1, 2006, Plaintiff brought suit against Defendant Unumprovident Corporation in Asotin County Superior Court, seeking a declaratory judgment regarding an accidental death insurance policy. That Complaint was amended to name Unum Life Insurance Company of America (hereinafter "Unum") as the sole defendant, and the case was removed to the U.S. District Court for the Eastern District of Washington on December 26, 2006. On January 9, 2007, Plaintiff filed a second lawsuit (Cause No. CV-07-011-FVS) in this Court regarding the same insurance policy, naming as defendants Direct Response Insurance Administrative Services, Inc., d/b/a Insurance Administrative Services (hereinafter "DRIASI"), and U.S. Bank, NA, d/b/a U.S. Bank Home Mortgage (hereinafter "U.S. Bank"). The two cases were consolidated under Cause No. CV-06-065-RHW on March 16, 2007.

1 Plaintiff seeks damages from Defendants Unum, DRIASI, and U.S. Bank
2 under theories of breach of contract, negligence, violations of the Washington State
3 Consumer Protection Act, bad faith, misrepresentation, and promissory estoppel.
4 Plaintiff also seeks recovery of reasonable attorney fees and costs pursuant to
5 *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wash. 2d 37 (1991) and RCW
6 19.86.090.

7 A bench trial was held on September 15-16, 2008, in Spokane, Washington.
8 At trial, Plaintiff was represented by Robert F. Greer, II. Unum and DRIASI were
9 represented by Charles C. Huber. U.S. Bank was represented by Scott R. Smith.
10 Having fully reviewed all the materials submitted by the parties and the record in
11 this matter, the Court enters the following Findings of Fact and Conclusions of
12 Law.

13 14 **FINDINGS OF FACT**

15 Most of the facts in this case are undisputed. The following Findings of Fact
16 are based on the facts stipulated by the parties in advance of trial and the evidence
17 adduced at trial.

18 The Court makes the following Findings of Fact:

19 Plaintiff Rodrick Matheny is the son of Keith Matheny and the sole
20 beneficiary of Keith Matheny's accidental death and dismemberment (hereinafter
21 "AD&D") policy underwritten by Unum. Unum sells certain insurance products
22 including AD&D products, and DRIASI is a third party administrator that provides
23 certain administrative services for Unum in connection with insurance policies,
24 including the AD&D policy at issue in this matter. Unum and DRIASI contracted
25 with U.S. Bank to implement a direct mail campaign through which Unum and
26 DRIASI would solicit enrollment in AD&D policies by U.S. Bank home mortgage
27 customers. U.S. Bank buys, sells, originates, markets, and services home
28 mortgages throughout the country.

1 The development and operation of the direct mail campaign are convoluted
2 processes that required the testimony of several witnesses to untangle. For present
3 purposes, the process began in 1997 when Unum reached an agreement with U.S.
4 Bank's predecessor, FirstStar Mortgage, authorizing FirstStar to solicit and procure
5 applications for Unum's insurance policies, and to collect the initial premium due.
6 In 1998, Unum delegated the duties associated with administering these policies
7 (including the billing and collection of all premiums) to DRIASI, who in turn
8 coordinated billing and collection duties with U.S. Bank.

9 At all times relevant to this lawsuit, the direct mail campaign operated as
10 follows: U.S. Bank included solicitation materials in the monthly mortgage
11 statements mailed to its mortgage customers. These materials (which will be
12 discussed in more detail below) notified mortgage customers that U.S. Bank would
13 provide them with \$3,000 in complimentary life insurance and offered customers
14 the option to select additional AD&D insurance coverage, the premiums for which
15 would be added to customers' monthly mortgage payments. If a customer decided
16 to enroll, U.S. Bank forwarded the customer's information to DRIASI, who
17 processed the application for Unum. After the policy was established, DRIASI
18 mailed a welcome packet to the customer, including a certificate of insurance and
19 schedule of benefits. U.S. Bank added customers' premiums to their monthly
20 mortgage statements and forwarded paid premiums to DRIASI, less 25% for U.S.
21 Bank's work in billing and collecting the premiums. Unum underwrote the AD&D
22 policies and eventually received from DRIASI the remainder of the premiums.

23 Keith Matheny was a customer of U.S. Bank (and its predecessor, FirstStar
24 Mortgage) from December 2001 through January 2004. In December 2001, Keith
25 Matheny took out a home mortgage with FirstStar Mortgage in the amount of
26 \$40,500, and began paying a monthly mortgage payment of \$344.51. Keith
27 Matheny was on a bill and receipt system, under which FirstStar (and later, U.S.
28 Bank) would send Keith Matheny a new mortgage statement upon receipt of each

1 payment. Keith Matheny received no regular monthly mortgage statements; even
2 though his mortgage payment was due on the first of each month, his statements
3 were generated only when U.S. Bank received each mortgage payment. By the fall
4 of 2003, Keith Matheny had prepaid his mortgage by months, and he paid his
5 December 2003 mortgage on October 6, 2003. The same day, U.S. Bank issued a
6 new mortgage statement showing that Keith Matheny's next payment of \$344.51
7 was due on January 1, 2004.

8 Included with Keith Matheny's January mortgage statement was a one-page
9 sheet inserted as part of the direct mail campaign described above. The sheet
10 included a solicitation letter on the front side, a summary of coverage on the back
11 side, and a detachable enrollment form at the bottom of the sheet.¹

12 The solicitation letter offered customers of U.S. Bank \$3,000 of AD&D
13 insurance at no cost, stating: "All you have to do to receive this insurance is
14 complete the enrollment form below and return it with your mortgage payment."
15 The letter went on to invite customers to select additional AD&D coverage up to
16 \$250,000, stating: "Premiums for the additional coverage you select will be
17 included with your monthly mortgage payment. There are no extra bills or checks
18 to write." The letter concluded: "Be sure to read the Summary of Insurance
19 Benefits on the backside of this letter. It explains the policy limitations and
20 exclusions of this insurance coverage." Above the enrollment form, the sheet
21 included a disclaimer stating that the insurance product solicited by the letter was

22
23 ¹These solicitation materials were designed by an entity named International
24 Marketing and Administration Company, who is not party to this lawsuit. The
25 solicitation letter bears the signature of one Edward Klayman, a "Licensed
26 Appointed Agent of Unum Life Insurance Company of America." Testimony of
27 multiple witnesses established that all Defendants named in this lawsuit reviewed
28 and approved the solicitation materials.

1 not a product of U.S. Bank or its affiliates, and was not insured by the Federal
2 Deposit Insurance Corporation or any other entity.

3 On the back of the sheet, the summary of coverage explained the monthly
4 premiums for the optional coverage, up to a monthly premium of \$27.50 for
5 \$250,000 of individual coverage. Under the heading, "Rates for Additional
6 Coverage - Coverage reduces 50% when Insured is age 70 or older," the following
7 language appeared: "Coverage is contingent upon our receipt of the first premium
8 prior to the due date and during the insured's lifetime. Your coverage is effective
9 on the first, regular billing date following acceptance of your application by the
10 Plan Administrator, provided your first month's premium has been paid." At the
11 bottom of this sheet (i.e., on the back of the detachable enrollment form), under the
12 heading "IMPORTANT," the following instructions appeared:

- 13
14 3. Mail your completed form. DO NOT SEND ANY PREMIUM
15 PAYMENT. The basic \$3,000 coverage is provided by the
16 financial institution with no further obligation to you. Premiums
for the additional coverage you select will be conveniently
added to your mortgage payment as soon as your new
Certificate of Insurance is issued.

17 Kelly Smith, a former director of the special risk underwriting department at
18 Unum that oversaw these AD&D policies, testified that Unum's goal with these
19 solicitation materials was to make it as easy as possible for home mortgage
20 customers to enroll by assuring them that no additional bills or checks were
21 necessary. Raymond LuBien, an expert in the banking and insurance industry who
22 has developed and implemented similar direct mail campaigns for several different
23 employers, also testified that insurance companies like Unum have had great
24 success with such campaigns precisely because of the ease with which customers
25 can enroll.

26 Keith Matheny signed the enrollment form on October 18, 2003, selecting
27 \$250,000 in additional coverage and designating his son, Plaintiff Rodrick
28 Matheny, as his beneficiary. U.S. Bank received the signed enrollment form

1 sometime thereafter, and forwarded the form on to DRIASI. DRIASI received this
2 enrollment form on November 6, 2003. DRIASI and Unum thereafter processed
3 and approved Keith Matheny's application.

4 On November 11, 2003, DRIASI sent Keith Matheny a set of documents that
5 an employee of DRIASI described in testimony as a "welcome packet." This
6 welcome packet was comprised of three documents: a welcome letter, schedule of
7 benefits, and certificate of insurance.

8 The welcome letter, which was signed by a Plan Administrator of DRIASI,
9 stated:

10 This valuable Plan provides you with a substantial sum of Accidental
11 Death and Dismemberment insurance protection – to help make sure
12 your loved ones are financially secure if an accident strikes.
13 And, of course, as long as you remain a US Bank Home Mortgage
customer and your premiums are paid when due, this important
coverage remains in force.

14 The welcome letter also mentioned the amount of Keith Matheny's monthly
15 premium (\$27.50). The schedule of benefits included an "Effective Date" (January
16 1, 2004) and information on coverage amounts. The certificate of insurance
17 enclosed with this packet was issued by Unum. The certificate referenced Master
18 Policy # GSR 19971 and included the following language: "This certificate
19 describes the main features of the Master Policy. Read it Carefully. However, the
20 Mater [sic] Policy is the only contract under which benefit payments are made...
21 We certify that We will provide you with the benefits for loss as described herein,
22 subject to the payment of premium." None of the three documents included in the
23 welcome packet mentioned a due date for Keith Matheny's first premium; none of
24 the documents repeated the statement that Keith Matheny's coverage was
25 contingent upon receipt of his first premium payment before the due date and
26 during his lifetime.

27 In November, through its normal course of operations, U.S. Bank
28 downloaded information from DRIASI indicating that some U.S. Bank customers,

1 including Keith Matheny, had selected optional insurance. On November 19, 2003,
2 U.S. Bank added a monthly premium of \$27.50 to Keith Matheny's mortgage
3 payment. U.S. Bank did not generate a new January mortgage statement reflecting
4 the increased amount due.

5 On January 6, 2004, U.S. Bank received Keith Matheny's January mortgage
6 payment in the amount of \$344.51. This was the amount shown on Keith
7 Matheny's January mortgage statement, which was generated before he selected
8 optional AD&D insurance and did not include the premium of \$27.50 that had
9 been added to his payment.

10 Also on January 6, 2004, U.S. Bank generated a new mortgage statement for
11 Keith Matheny, with payment due February 1, 2004. The statement showed a total
12 amount due of \$372.01, which included a mortgage payment of \$344.51 and an
13 insurance premium of \$27.50 (listed on the statement as "Other"). Accompanying
14 the mortgage statement was a "Notice of Non-Payment of Optional Insurance,"
15 stating: "The payment due 01-01-04 of your loan has been applied without optional
16 insurance premiums of 27.50. Please return your remittance with this notice to
17 keep your insurance in force." Testimony at trial established that, according to its
18 normal practices, U.S. Bank would have mailed the statement and notice to Keith
19 Matheny on January 7, 2004.

20 On January 10, 2004, Keith Matheny died in a single car accident before
21 making any additional payments to Defendants. On February 9, 2004, Plaintiff
22 Rodrick Matheny submitted payment to U.S. Bank in the amount of \$372.01.

23 Plaintiff submitted a claim for death benefits to DRIASI on February 20,
24 2004. On March 8, 2004, Unum sent Plaintiff a check for \$3,000 – the amount of
25 basic coverage provided for Keith Matheny by U.S. Bank. On March 11, 2004,
26 Unum sent Plaintiff a letter notifying him that additional benefits were not payable
27 because Unum had not received Keith Matheny's first premium payment prior to
28 the due date and during the insured's lifetime, and thus the AD&D policy never

1 became effective. Plaintiff appealed that decision on June 7, 2004; the appeal was
2 denied on the same basis on July 2, 2004. This suit followed.

3 In addition to the foregoing chronology, the Court finds the following
4 evidence to be relevant to its determination.

5 A document setting forth U.S. Bank's optional insurance procedures was
6 entered into evidence at trial. This document indicates a "revised" date of March
7 15, 2004. At trial, Sarah Johnson-Fodge (supervisor of the insurance department at
8 U.S. Bank) testified that this document sets forth revisions to the optional
9 insurance procedures that would have been adopted by the department in the year
10 preceding March 15, 2004. Ms. Johnson-Fodge could not recall when the particular
11 procedures relevant to this matter were adopted, but testified that they would have
12 been in place prior to March 15, 2004. It is more likely than not that the revised
13 procedure was in effect in October 2003.

14 For a mortgage customer who has just added optional insurance to their
15 account, these procedures provide that a new statement must be generated when the
16 system shows that "the loan due date is equal to the plan due date." Ms. Johnson-
17 Fodge explained that "loan due date" means the date on which the customer's
18 mortgage payment is due, and "plan due date" means the date on which the
19 customer's new insurance premium payment is due. Thus, if a customer had
20 recently selected optional AD&D insurance, and the first premium for that
21 insurance was due on the same date as the customer's next mortgage payment,
22 these procedures provide that a new mortgage statement should be generated to the
23 customer. Ms. Johnson-Fodge testified that these procedures were adopted in
24 response to repeated problems U.S. Bank had experienced with mortgage
25 customers on the bill and receipt system missing their first insurance premium
26 payment.

27 Also entered into evidence at trial was Master Policy # GSR 19971.
28 Although Keith Matheny never saw a copy of this instrument, his insurance

1 contract with Unum was controlled by its terms. The Master Policy purports to be
2 an agreement between Unum and an entity styled “Upper Northwest Bankers
3 Association,” defined as “the Policyholder.” The Master Policy also defines
4 “Insured” as “All eligible persons described in the Application who are enrolled
5 for this insurance.”

6 The Master Policy includes provisions for “Premiums and Grace Period,”
7 which were updated by an endorsement effective July 1, 1997. Those provisions
8 read:

9 Premiums are due for this Policy on or before the date the Policy
10 begins or on or before the anniversary date, whichever applies. If the
11 premium is not paid when it is due, the Policyholder has a 31 day
12 grace period to pay. During the Grace Period, the Policy will stay in
13 force. There is no grace period if We have given the Policyholder
14 notice at least 30 days before the premium due date that we are going
15 to end the Policy. If the Policyholder does not pay the premium by the
16 end of the Grace Period, the Policy will end. The Policyholder must
17 pay Us the pro rate premium for the time the Policy was in force
18 during the Grace Period.

19 Testimony at trial established that the Upper Northwest Bankers Association
20 is essentially a holding company whose sole *raison d’etre* is to satisfy the legal
21 requirements for creation of a group policy under which individual mortgage
22 customers can obtain AD&D insurance from Unum. The Master Policy and its
23 endorsements are signed only by agents of Unum. No premium payments were
24 ever made by the Upper Northwest Bankers Association; all premium payments
25 were in fact made by individual mortgage customers, who this Master Policy
26 would define as “Insured.”

27 At trial, there was some confusion over what was the actual due date for
28 Keith Matheny’s first insurance premium payment. Ms. Smith, who directed the
department at Unum that was in charge of these AD&D policies, testified that no
coverage would have existed unless Unum *received* the premium payment by
December 31, 2004. However, U.S. Bank’s internal reports indicated that the due
date for payment was January 1, 2004, the date Keith Matheny’s January mortgage

1 payment was due. Ms. Johnson-Fodge also testified that, while customers'
2 mortgage payments are due on the first of the month, the bank does not charge late
3 fees until the 15th of the month, and the bank will not report the account delinquent
4 until the last day of the month. As noted above, neither the solicitation materials
5 nor the welcome packet that Keith Matheny received specified a due date for his
6 first premium payment.

7 CONCLUSIONS OF LAW

8 Plaintiff seeks damages from Unum, DRIASI, and U.S. Bank under theories
9 of breach of contract, negligence, violations of the Washington State Consumer
10 Protection Act, bad faith, misrepresentation, and promissory estoppel. Plaintiff also
11 seeks recovery of reasonable attorney fees and costs pursuant to *Olympic*
12 *Steamship Co. v. Centennial Ins. Co.*, 117 Wash. 2d 37 (1991) and RCW
13 19.86.090. The Court makes the following conclusions of law regarding those
14 claims.

15 I. BREACH OF CONTRACT

16 Plaintiff asserts breach of contract claims against Unum and U.S. Bank.

17 A. *Unum*

18 Plaintiff argues that an insurance contract was formed between Keith
19 Matheny and Unum, and Unum breached that contract by failing to pay death
20 benefits in the amount of \$250,000. Unum acknowledges that the solicitation
21 materials sent to Keith Matheny were an offer, and that the return of Keith
22 Matheny's signed enrollment form constituted acceptance of that offer. However,
23 Unum argues that no contract was formed because Keith Matheny failed to fulfill a
24 condition precedent, *viz.*: payment of the first premium prior to the due date and
25 during Keith Matheny's lifetime. In response, Plaintiff argues that Unum is now
26 estopped from asserting that condition precedent or, alternatively, that Unum
27 waived that condition precedent.

28 Separately, Plaintiff seeks a declaratory judgment that the grace period

provided by the Master Policy applies to Keith Matheny, and that Unum breached its contract by denying Plaintiff's claim without applying the grace period.

(i). *Estoppel*

The elements of estoppel are:

(1) an admission, statement, or act inconsistent with a claim afterward asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury which would result to the relying party if the first party were allowed to contradict or repudiate the prior act, statement or admission.

Colonial Imports, Inc. v. Carlton Northwest, Inc., 121 Wash. 2d 726, 734 (1993).

These elements must be proven by clear and convincing evidence. *Id.* at 734-35.

Under Washington law, "the general rule is that, while an insurer may be estopped, by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, yet under no conditions can the coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel." *Carew, Shaw & Bernasconi v. General Cas. Co.*, 189 Wash. 329, 336 (1937). The rule has been criticized as "eroding," and Washington law recognizes at least two exceptions to it. *Estate of Hall v. HAPO Fed. Credit Union*, 73 Wash. App. 359, 362-63 (1994) (quoting 16B J. Appleman, *Insurance Law* § 9090, at 582 n. 5 (1981)); see *Saunders v. Lloyd's of London*, 113 Wash. 2d 330, 336 (1989) (holding that an insurer can be estopped from denying coverage for failure to make payments where that insurer has established a course of conduct of accepting late payments); *Safeco Ins. Co. of Am. v. Butler*, 823 P.2d 499, 505-06 (Wash. 1992) (holding the *Carew* rule to be inapplicable to claims of insurer bad faith).

The Court finds the *Carew* rule inapplicable. In *Carew*, the insured received a policy that insured only a certain kind of safe from burglary. The insured tried to amend the coverage language to cover a different area of the safe. Under the policy as written, there was no coverage. Plaintiff here is not seeking to change the insurance contract's substantive terms of coverage, which would implicate the *Carew* rule. Rather, Plaintiff argues that Unum is estopped from relying on a

1 condition precedent to coverage, circumstances which are outside of the
2 *Carew* rule.

3 Turning to the elements of estoppel, the undisputed facts establish that
4 Unum's later assertion of a condition precedent is inconsistent with numerous
5 statements in the materials received by Keith Matheny before his death. The
6 solicitation letter informed him that, "All you have to do to receive this insurance
7 is complete the enrollment form below and return it with your mortgage payment...
8 there are no extra bills or checks to write." While the summary of coverage
9 provided, under an impertinent heading, that "coverage is contingent upon our
10 receipt of the first premium prior to the due date and during the insured's lifetime,"
11 below that language and under the heading "IMPORTANT," the letter instructed
12 Keith Matheny: "DO NOT SEND ANY PREMIUM PAYMENT." Furthermore,
13 the words used in the welcome letter, certificate of insurance, and the Notice of
14 Non-Payment of Optional Insurance all create the impression that the AD&D
15 policy was in force on the dates Keith Matheny received those documents.

16 The Court finds instructive a decision out of the Fifth Circuit Court of
17 Appeals, *Monumental Life Ins. Co. v. Hayes-Jenkins*, 403 F.3d 304 (5th Cir.
18 2005).² *Monumental's* facts are nearly identical to those of the case at bar. There,
19 as here, the insured could only have fulfilled the asserted condition precedent by
20 disregarding the solicitation materials' instructions *not* to write any additional
21 checks. *See id.* at 312.

22 The solicitation materials, read as a whole, instructed Keith Matheny that all
23 he must do to receive coverage was to return the enrollment form. After he did so,
24 the additional materials he received fostered the impression that his coverage was
25 already in force. The evidence adduced at trial established that Keith Matheny

26
27 ² Although this decision applies Texas law, the elements of estoppel in that
28 jurisdiction are essentially identical to the elements of estoppel under Washington
law.

1 relied on those statements, and the Court finds that reliance to be reasonable.
2 Moreover, it is undisputed that Plaintiff has been injured because of his father's
3 reliance. Thus, the Court finds that Plaintiff has proven all three elements of
4 estoppel by clear and convincing evidence.

5 (ii). *Waiver*

6 In the insurance context, "waiver requires that the insurers voluntarily and
7 intentionally relinquished a known right or that their conduct 'warrants an
8 inference of the relinquishment of such right.'" *Saunders*, 113 Wash. 2d at 339-40
9 (quoting *PUD 1 v. WPPSS*, 104 Wash. 2d 353, 365 (1985)). Waiver by conduct
10 requires unequivocal acts evincing the intent to waive. *Id.*; *Mike M. Johnson, Inc.*
11 *v. County of Spokane*, 150 Wash. 2d 375, 386 (2003); *James E. Torina Fine*
12 *Homes, Inc. v. Mutual of Enumclaw Ins. Co.*, 118 Wash. App. 12, 19 (2003).

13 The summary of coverage included in the solicitation materials did articulate
14 Unum's right to require payment of the first premium as a condition precedent to
15 coverage. However, other language in the solicitation materials – language that was
16 highlighted and tagged as "IMPORTANT" – suggested that Unum had decided not
17 to enforce that right. Standing alone, this language probably would not amount to
18 the kind of unequivocal act necessary to infer waiver by conduct. However, the
19 impression that Unum knowingly waived its right was bolstered by its issuance of
20 a welcome letter, schedule of benefits, and a certificate of insurance before it
21 received Keith Matheny's first premium payment. The Court finds that the
22 issuance of this welcome packet, together with the language in the solicitation
23 materials, constitutes unequivocal evidence of Unum's intent to relinquish its right
24 to require payment of the first premium prior to coverage. Accordingly, the Court
25 deems Unum to have waived that condition precedent.

1 (iii). *Interpretation of the Master Policy*

2 The following principles apply to the Court's interpretation of the Master
3 Policy:

4 The policy should be interpreted in accordance with the way it would
5 be understood by the average person purchasing insurance. It must not
6 be forgotten that the purpose of insurance is to insure, and that
7 construction should be taken which will render the contract operative,
rather than inoperative. A construction which contradicts the general
purpose of the contract or results in a hardship or absurdity is
presumed to be unintended by the parties.

8 *Phil Schroeder v. Royal Globe Ins. Co.*, 99 Wash. 2d 65, 68 (1983) (internal
9 citations and quotations omitted).

10 The grace period purportedly applies to the Policyholder, defined as the
11 Upper Northwest Bankers Association. Because this entity is solely a holding
12 company who pays no premiums, granting it the benefit of a grace period renders
13 this provision of the Master Policy absurd. The only reasonable construction of the
14 Master Policy is that the grace period applies to the one party who does pay
15 premiums: the insured. Therefore, Unum's failure to extend the grace period to
16 Keith Matheny breached its obligation under the Master Policy.

17 In conclusion: Plaintiff has established that an insurance contract was
18 formed between Keith Matheny and Unum, and that Unum breached that contract
19 by failing to pay death benefits and failing to extend the benefit of the Master
20 Policy's grace period to Keith Matheny. The evidence establishes both that Unum
21 waived its right to require payment of the first premium as a condition precedent,
22 and that Unum is now estopped from asserting that condition precedent.

23 *B. U.S. Bank*

24 Plaintiff's breach of contract claim against U.S. Bank is of a different order:
25 Plaintiff claims that U.S. Bank assumed a contractual duty to add Keith Matheny's
26 insurance premium to his mortgage statement, and breached that duty by failing to
27 issue a new mortgage statement including the premium amount before the premium
28 payment was due. At trial, U.S. Bank acknowledged that it had assumed an

1 obligation of some nature, but declined to say whether a claim for breach of that
2 obligation would sound in contract or tort. Regardless, U.S. Bank argues that its
3 obligation was limited to adding Keith Matheny's insurance premium to his
4 mortgage *payment* (and his next routinely generated mortgage statement), not
5 generating a new mortgage *statement*.

6 Washington law recognizes two kinds of contracts: unilateral and bilateral.
7 *Higgins v. Egbert*, 28 Wash. 2d 313, 317-18 (1947). In unilateral contracts, the
8 promise of one party becomes binding when the other party performs the act upon
9 which the promise is based. *Id.*; see also *Multicare Medical Ctr. v. Dep't of Social*
10 *and Health Serv.*, 114 Wash. 2d 572, 584 (1990). Sufficient consideration for a
11 unilateral contract may be provided by a benefit received by the promisor at the
12 request of the promisor. *Browning v. Johnson*, 70 Wash.2d 145, 148 (1967).

13 The Court finds that the solicitation materials received by Keith Matheny
14 constituted an offer from U.S. Bank to form a unilateral contract. U.S. Bank's
15 promise is articulated on the enrollment form by the following language:

- 16 3. Mail your completed form. DO NOT SEND ANY PREMIUM
17 PAYMENT. The basic \$3,000 coverage is provided by the
18 financial institution with no further obligation to you. Premiums
19 for the additional coverage you select will be conveniently
added to your mortgage payment as soon as your new
Certificate of Insurance is issued.

20 This promise became binding when Keith Matheny signed and returned the
21 enrollment form. The consideration for this promise was the benefit U.S. Bank
22 would receive from Keith Matheny's continuing performance (*viz.*, 25% of all
23 premiums paid).

24 U.S. Bank's argument that it promised only to add the premium to Keith
25 Matheny's *payment*, not his *statement*, minces words and is unpersuasive. Read as
26 a whole, the solicitation materials promise to bill the insured in such a way as to
27 effectuate timely payment of the insurance premiums. Addition of the premium
28 amount to U.S. Bank's internal accounting system was insufficient to fulfill this

1 promise. When Keith Matheny returned the signed enrollment form, U.S. Bank
2 was contractually obligated to bill him for his insurance premiums in advance of
3 their due dates. That Keith Matheny had elected to receive his mortgage statements
4 on a bill and receipt system was of no import and does not affect U.S. Bank's
5 obligation. U.S. Bank breached its obligation when it failed to bill Keith Matheny
6 in advance of the first premium payment's due date. That Plaintiff has suffered
7 injury as a result of breach (*viz.*, the denial of his insurance claim) is undisputed.

8 **II. NEGLIGENCE**

9 Plaintiff argues that U.S. Bank undertook the obligation to bill Keith
10 Matheny for his optional AD&D insurance premiums, and breached that duty by
11 failing to exercise ordinary care in the billing and collection of those premiums.
12 U.S. Bank concedes the existence of a duty, but argues that it fulfilled that duty by
13 adding Keith Matheny's insurance premium to his mortgage payment and
14 including that amount on his next regularly generated mortgage statement.

15 To prove negligence, Plaintiff must establish "the existence of a duty, a
16 breach thereof, a resulting injury, and proximate causation between the breach and
17 the resulting injury." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash. 2d 468, 474
18 (1998). A party who undertakes to render services for another is liable for harm
19 resulting from the party's failure to exercise reasonable care. *Estes v. Lloyd*
20 *Hammerstad, Inc.*, 8 Wash. App. 22, 26 (1972) (citing Restatement (Second) of
21 Agency § 379(2) (1958)).

22 The evidence establishes that U.S. Bank assumed the duty of timely billing
23 Keith Matheny for his insurance premiums. Further, the evidence establishes that
24 U.S. Bank failed to comply with its own billing procedures for optional AD&D
25 insurance, which were in place at the time Keith Matheny elected to receive
26 AD&D coverage. These procedures provide that U.S. Bank should generate new
27 mortgage statements for customers who elect to receive optional AD&D coverage
28 after their regular mortgage statements have already been issued. Here, U.S. Bank

1 simply failed to do so, and thus breached its duty. This breach was the proximate
 2 cause of Unum's denial of Plaintiff's insurance claim, an injury for which the
 3 Court thus finds U.S. Bank liable.

4 **III. WASHINGTON STATE CONSUMER PROTECTION ACT** 5 **VIOLATIONS, MISREPRESENTATION, AND BAD FAITH**

6 Plaintiff claims that Unum and U.S. Bank are liable under the Washington
 7 State Consumer Protection Act ("CPA") for deceptive acts in connection with their
 8 solicitation and billing of AD&D premiums. Plaintiff also claims that DRIASI and
 9 Unum are liable under the CPA and common law for their bad faith failures to
 10 investigate Plaintiff's insurance claim.

11 There are five elements of a CPA claim: "(1) an unfair or deceptive act or
 12 practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury
 13 to plaintiff in his or her business or property, and (5) causation." *Estate of Hall*, 73
 14 Wash. App. at 365. No CPA claim will lie for an insurer's denial of an insurance
 15 claim where the insurer has a reasonable justification for denying coverage. *Id.* at
 16 366. The insurance commissioner has defined a number of practices as deceptive
 17 acts, including "misrepresenting pertinent facts or insurance policy provisions" and
 18 "refusing to pay claims without conducting a reasonable investigation." WAC 284-
 19 30-330. To determine whether a deceptive act impacts public interest, the
 20 following factors are relevant:

21 (1) Were the alleged acts committed in the course of defendant's
 22 business? (2) Are the acts part of a pattern or generalized course of
 23 conduct? (3) Were repeated acts committed prior to the act involving
 24 plaintiff? (4) Is there a real and substantial potential for repetition of
 25 defendant's conduct after the act involving plaintiff? (5) If the act
 26 complained of involved a single transaction, were many consumers
 27 affected or likely to be affected by it?

28 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778,
 790 (1986).

Plaintiff does not claim that Unum's denial of coverage violated the CPA,
 but rather that Unum and U.S. Bank misrepresented pertinent policy provisions in

1 their solicitation of Keith Matheny's business. The Court agrees. As detailed
2 above, the solicitation materials affirmatively misrepresented the condition that
3 coverage was contingent upon payment of the first premium, representing instead
4 that coverage was created simply by returning a signed enrollment form. The
5 welcome packet materials added another layer of misrepresentation, fostering the
6 impression that Keith Matheny's insurance coverage was already in force. In
7 addition, the Court finds that these deceptive acts satisfy the *Hangman* factors for
8 public interest impact. The solicitation and welcome packet materials were part of
9 an ongoing course of conduct affecting thousands of consumers, both before and
10 after the incidents at issue here. Because of this strong public interest impact, the
11 Court finds that treble damages authorized by RCW 19.86.090 are appropriate.

12 The misleading language in the solicitation and welcome packet materials
13 also meets the elements of a misrepresentation claim: "(1) a false statement (2)
14 made to induce a business transaction (3) upon which the other party justifiably
15 relies." *Amtruck Factors v. Int'l Forest Products*, 59 Wash. App. 8, 18 (1990).
16 Here, Keith Matheny justifiably relied on the false statements in the solicitation
17 materials that no additional checks were necessary in order to effectuate coverage.

18 In addition to violating the CPA, a failure to investigate an insurance claim
19 can support a bad faith cause of action. *Coventry Associates v. American States Ins.*
20 *Co.*, 136 Wash. 2d 269, 279 (1998). However, no claim for bad faith will lie where,
21 as here, "the insurance company acts with honesty, bases its decision on adequate
22 information, and does not overemphasize its own interests." *Id.* at 280. There is no
23 evidence that DRIASI and Unum failed to adequately and reasonably investigate
24 Plaintiff's claim in good faith. Therefore, Plaintiff's claims on these grounds must
25 fail.

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DAMAGES

Plaintiff is entitled to damages from Unum and U.S. Bank for breach of contract, violations of the CPA, and misrepresentation. Plaintiff is also entitled to damages from U.S. Bank for negligence. Plaintiff has proven no claims against DRIASI.

The amount of actual damages is Plaintiff's benefit of the bargain, the amount of the losses proximately caused by Defendants' breach of contract and misrepresentation: \$250,000.00. *See Turner v. Enders*, 15 Wash. App. 875, 880 (1976). In addition, the Court finds that treble damages in the statutory maximum amount of \$10,000.00 are appropriate. *See RCW 19.86.090*. Defendants Unum and U.S. Bank are thus jointly and severally liable for damages in the amount of \$260,000.00.

Plaintiff also seeks pre-judgment interest, as well as reasonable attorney fees and costs pursuant to *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wash. 2d 37(1991) and RCW 19.86.090. Plaintiff has submitted briefing on the issue of pre-judgment interest (see Ct. Rec. 107), but Defendants have not yet submitted a response. Defendants are directed to do so, and Plaintiff is directed to submit briefing on the issue of fees and costs.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff is to present a proposed judgment consistent with this Order.

2. No later than thirty days from the date of this Order, the parties shall submit briefing to the Court on the issues of prejudgment interest and attorneys fees and costs.

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1 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
2 Order and forward copies to counsel.

3 **DATED** this 7th day of January, 2009.

4 *S/ Robert H. Whaley*

5 **ROBERT H. WHALEY**
6 Chief United States District Judge

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